

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>United Communications Systems, Inc.</b>	)	
<b>d/b/a Call One</b>	)	
	)	
<b>Petition for Arbitration of an</b>	)	<b>Docket No. 03-0772</b>
<b>Interconnection Agreement with</b>	)	
<b>Illinois Bell Telephone Company d/b/a</b>	)	
<b>SBC Illinois, Pursuant to Section 252(b)</b>	)	
<b>of the Telecommunications Act of 1996</b>	)	

**SBC ILLINOIS' RESPONSE TO UCS'S MOTION TO STRIKE  
TESTIMONY RELATED TO AVOIDED COST STUDY**

SBC Illinois is entitled to present evidence in support of its position regarding the appropriate interim wholesale discount rate for the resale of ICBs to new end users, particularly when, as explained below, UCS itself invited SBC Illinois to submit such evidence. Moreover, UCS's motion to strike SBC Illinois' avoided cost evidence is based on the false premise that because the rate the Commission is going to establish will be an interim rate, the Commission should not bother to make it as accurate as it can. In addition, UCS's motion is nothing more than an improper request that the Commission prematurely decide arbitration Issue No. 3 in favor of UCS before the evidentiary hearing in this proceeding. For these reasons, and the additional reasons explained below, UCS's latest unfounded motion should be denied.

**ARGUMENT**

Issue No. 3 in UCS's Petition for Arbitration raises the issue of what interim average wholesale discount rate the Commission should adopt for the resale of ICBs to new end users, subject to true-up following a Commission order establishing a permanent wholesale discount rate. UCS Petition, pp. 16-20. In the Joint Statement of Craig Foster and Chris Surdenik (pp. 32-40), UCS proposes a 20.07% interim rate, and presented evidence in support of that proposal.

SBC Illinois proposes a 4.6% interim rate, and presented evidence of that proposal in the direct testimony of Anthony M. Cohen, which included a supporting avoided cost study (Confidential Schedule AMC-1). UCS now seeks to strike virtually all of SBC Illinois' evidence in support of its position on arbitration Issue No. 3. UCS's motion should be denied for several reasons.

*First*, it would be patently unfair to preclude SBC Illinois from presenting evidence in support of its position. In fact, it would potentially violate SBC Illinois' due process rights. UCS was allowed to present (and in fact did present) whatever evidence it wanted in support of its proposed 20.07% interim wholesale discount rate when it submitted its direct testimony. Staff also took advantage of its opportunity to present evidence regarding arbitration Issue No. 3. But if the Commission grants UCS's motion and strikes SBC Illinois' avoided cost evidence, SBC Illinois will be precluded from presenting *any evidence* in support of its proposed interim wholesale discount rate of 4.6%. With all the evidence in hand, the Commission may decide to adopt UCS's 20.07% proposal, or it may decide to adopt SBC Illinois' 4.6% proposal, or it may arrive at some other resolution of the issue. Plainly, though, it would be improper to resolve the issue in UCS's favor by excluding SBC Illinois' evidence – all of which, as UCS does not dispute, is relevant to the issue UCS raised.

*Second*, striking SBC Illinois' avoided cost evidence would prevent the Commission from establishing the most accurate interim wholesale discount rate possible under the circumstances. Under the Telecommunications Act of 1996 ("1996 Act"), the wholesale prices that SBC Illinois charges UCS *must* be based upon "retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by" SBC Illinois – avoided costs, in other words. 47 U.S.C. § 252(d)(3). And the evidence that UCS has moved to strike is

evidence of SBC Illinois' avoided costs. Moreover, UCS's motion presents the Commission with two options for establishing an interim wholesale discount rate for the resale of ICBs to new end users in this proceeding: (1) UCS's approach, which involves adopting an interim wholesale discount rate based on a party's say-so that a particular rate is appropriate; or (2) SBC Illinois' approach, which involves adopting an interim wholesale discount rate based on evidence regarding SBC Illinois' actual avoided costs – the costs that federal law requires the Commission to consider. Clearly, SBC Illinois' is the more prudent approach, because under UCS's approach the Commission essentially would be forced to “shoot in the dark” and guess as to which party's proposed interim wholesale discount rate is the most appropriate, instead of adopting the most accurate interim rate based on the evidence available.

*Third*, UCS's claim that there is not adequate time in a Section 252(b) arbitration proceeding such as this to consider SBC Illinois' avoided cost evidence is not a legitimate basis for striking that evidence. Contrary to UCS's contention, the 1996 Act contemplates that rates will be set in arbitration proceedings. In fact, Section 252(c)(2) expressly states that in Section 252(b) arbitrations state commissions shall, among other things, “establish any rates for interconnection, services, or network elements.” Accordingly, UCS's contention that SBC Illinois' avoided cost evidence should be stricken because “the timetable for an arbitration is not suited for the thorough examination of a cost study” must be rejected as a matter of law. Furthermore, the purpose of SBC Illinois' avoided cost evidence is to assist the Commission in establishing the most accurate *interim* – not permanent – wholesale discount rate it can, *subject to true-up* following a more comprehensive cost proceeding. Therefore, even if the Commission ultimately finds itself unable to complete within the statutory time constraints of this proceeding the comprehensive cost analysis that UCS apparently contemplates, the Commission, and the

purposes of the 1996 Act, will still have been better served by paying some heed to SBC Illinois' avoided cost evidence than by ignoring it altogether.

*Fourth*, UCS's contention that SBC Illinois' avoided cost evidence should be stricken because "[o]ther CLECs who will be affected by the interim rates have no right to participate"<sup>1</sup> in this proceeding has no merit. Indeed, to the extent any other CLEC objects to whatever interim wholesale discount rate is ultimately adopted by the Commission in this proceeding (regardless of whether that rate is adopted under UCS's or SBC Illinois' approach), that CLEC is perfectly free to refuse that rate when it negotiates an interconnection agreement with SBC Illinois and arbitrate the issue, just as UCS is doing now. Furthermore, as noted above, the goal in this proceeding is to establish an interim wholesale discount rate subject to true-up after the Commission considers the rate in a comprehensive cost proceeding, in which all CLECs may participate.

*Fifth*, UCS asserts that FCC rule § 51.611 (47 C.F.R. § 51.611) requires this Commission to adopt a "proxy" avoided discount rate between 17-25%.<sup>2</sup> While UCS's argument may be properly included in its post-evidentiary hearing briefs, it is absolutely no basis for striking SBC Illinois' avoided cost evidence. In fact, Section 51.611 states:

(a) If a state commission cannot, *based on the information available to it*, establish a wholesale rate using the methodology prescribed in § 51.609, then the state commission *may* elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission *may* establish interim wholesale rates that are at least 17 percent and no more than 25 percent, below the incumbent LEC's existing retail rates . . .

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<sup>1</sup> UCS Second Motion to Strike, p. 4

<sup>2</sup> UCS Second Motion to Strike, pp. 3 (note 5), 5-6.

47 C.F.R. § 51.611(a)&(b) (emphasis added). It is clear from this language that Section 51.611 presumes that at least some avoided cost information will be available to the Commission in making its determination regarding the interim wholesale discount rate. But UCS seeks to strike that evidence before the Commission even has the opportunity to consider it – and decide for itself – whether the information is sufficient to help establish the most appropriate and accurate interim wholesale discount rate. The language of Section 51.611 also makes clear that a Commission is not under any circumstances *required* to adopt a proxy wholesale discount rate of between 17-25%, as UCS contends. Rather, the Commission “may” adopt a proxy rate within that range.

Moreover, UCS’s motion to strike SBC Illinois’ avoided cost evidence is particularly perplexing given the fact that UCS itself invited SBC Illinois to file an avoided cost study in response to UCS’s testimony on arbitration Issue No. 3. Indeed, UCS’s Joint Statement of Craig Foster and Chris Surdenik (p. 36, lines 12-15) specifically states that “UCS maintains that established FCC rules require that in the event the ILEC *fails to submit an avoided cost study* to establish a wholesale discount for resale of generic ICBs to New End Users, FCC rule 51.611 requires the establishment of a discount rate within a ‘default’ range of 17% to 25%.” (emphasis added). Therefore, consistent with UCS’s own interpretation of FCC Rule 51.611, SBC Illinois was required to submit its avoided cost evidence in order to support its proposed 4.6% interim wholesale discount rate. For these additional reasons, UCS’s motion should be denied.

*Finally*, UCS asserts that all of SBC Illinois’ avoided cost evidence should be stricken because “there is very little logic in SBC’s suggestion that a cost study is needed at all” given the fact that SBC Illinois recognizes that the 3.51% avoided cost discount applies to both assumed

tariff services and assumed ICBs.<sup>3</sup> UCS's argument should be rejected because at bottom, it is nothing more than a request that the Commission prematurely decide arbitration Issue No. 3 in favor of UCS by rejecting SBC Illinois' proposed 4.6% interim wholesale discount rate. And again, while UCS's argument may be proper for its post-evidentiary hearing briefs, it provides absolutely no basis for striking all of SBC Illinois' avoided cost evidence in support of its position that the Commission should adopt an interim wholesale discount rate of 4.6%.

### **CONCLUSION**

Based on the foregoing, the Commission should reject UCS's Motion to Strike SBC Illinois' Testimony Related to its Avoided Cost Study.

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Respectfully submitted,

SBC ILLINOIS

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<sup>3</sup> UCS Second Motion to Strike, p. 6-7. UCS erroneously states that the avoided cost discount for assumed tariff services and ICBs is 3.51%. As noted in the direct testimony of Anthony Cohen (p. 2), the correct avoided discount for assumed tariff services and ICBs is 3.16%. See also UCS Joint Statement of Craig Foster and Chris Surdenik, pp. 32-33.